APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL EDWARD BLAYLOCK,
Appellant,
vs.
C. J. FITZHARRIS, Superintendent,
Appellee.
No. 26,714

[February 17, 1972]

Appeal from the United States District Court for the Eastern District of California

Before: HAMLEY, ELY, and TRASK, Circuit Judges.

PER CURIAM:

Blaylock is a California state prisoner. Claiming that certain of his federal constitutional rights had been infringed, he filed a petition for habeas corpus in the District Court. The District Court, without conducting an evidentiary hearing, denied the petition upon the grounds that Blaylock had failed to exhaust available state court remedies and that he had deliberately bypassed the California courts.

Blaylock's state court conviction was for the offense of manslaughter, and he did not take a timely appeal from that conviction. Subsequently, he sought unsuccessfully to take an untimely appeal to the California appellate courts, and he was also unsuccessful in obtaining relief by way of habeas corpus in the California courts.

We have concluded that Blaylock did in fact exhaust his available state court collateral remedies, and here, the appellee does not argue to the contrary.

The District Court apparently arrived at its conclusion that Blaylock had deliberately bypassed the state courts because he failed promptly to take a direct appeal from the state court judgment of conviction. On the deliberate bypass issue, the Supreme Court has set forth the appropriate standard as follows:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default."

Fay v. Noia, 372 U.S. 391, 439 (1963).

In applying the foregoing standard adversely to Blaylock, the court apparently relied upon two statements supplied by Blaylock in the court's standard habeas corpus form. Blaylock wrote that he did not promptly take a state court appeal because he "[d]id not know [his] rights had been violated" and because he "[w]as advised by appointed attorney not to appeal." We do not interpret either of these statements as clearly revealing that Blaylock "understandingly and knowingly forewent the privilege of

seeking to vindicate his federal claims in the state courts. . . ." As we interpret *Fay v. Noia,* the deliberate bypass rule may not be applied against one who does not knowingly and understandably participate in the choice not to take an appeal from a state court conviction. *Id.* at 439. Moreover, *Fay v. Noia* held that a habeas petitioner is entitled to an evidentiary hearing on the issue, if genuine, of deliberate bypass, and our court has, of course consistently followed this direction. *Pineda v. Craven,* 424 F.2d 369, 371 (9th Cir. 1970); *Taylor v. Arizona,* 424 F.2d 271, 273 (9th Cir. 1970).

Upon remand, the District Court must conduct an evidentiary hearing on the deliberate bypass issue, and if that issue is resolved in Blaylock's favor, conduct the necessary inquiry into Blaylock's claims as to the infringement of rights guaranteed to him by the federal constitution.

Reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

PAUL EDWARD BLAYLOCK, *Petitioner,* vs. C. J. FITZHARRIS, Supt., *Respondent.*	CIV. S–1452 MEMORANDUM AND ORDER

Petitioner has filed with this court an application for a writ of habeas corpus, challenging his custody by the Superintendent of the Correctional Training Facility at Soledad, California.

Petitioner was convicted of the crime of manslaughter and is serving a term for that conviction. He states that on the advice of counsel he did not appeal from the judgment of conviction.

Habeas corpus will not lie in a federal court where a state prisoner has waived his opportunity to present his claims to the state court for adjudication by a deliberate bypass of appellate procedure. *Fay v. Noia,* 372 U.S. 391 (1963); Title 28 U.S.C. § 2254.

While petitioner presented his complaints to the California courts by way of habeas corpus, it is apparent he did not meet the standards required in the forum, either by way of procedures or factual statements. *In re Shipp,* 62 Cal. 2d 547, 553 (1965); *In re Swain,* 34 Cal. 2d 300, 302 (1949).

From the foregoing it is apparent as a matter of law that petitioner is not entitled to the relief he seeks in this court.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus be, and the same is hereby, denied.

DATED April 14, 1970 M. D. CROCKER

United States District Judge

APPENDIX C

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order, except that an appeal from an order denying a motion for a new trial in cases where the defendant is committed before final judgment for sexual psychopthy, insanity, or narcotics addiction may be taken within 10 days after the making of such order or the defendant's commitment, whichever is later. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed and that he may petition the reviewing court for relief by verified statement or declaration under penalty of perjury, setting forth the date of the order or judgment from which the party seeks to appeal, the steps which the party took to file his notice of appeal on time, and any other information which has, or which the party believes has, a bearing upon the circumstances which caused the notice of appeal to arrive late.

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